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81-2330

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARPER OIL COMPANY,

Petitioner,

v.

CORPORATION COMMISSION OF OKLAHOMA AND HARVEY W. DIERKSEN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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June 7, 1982

QUESTIONS PRESENTED[1]

1. *Whether the order of the Oklahoma Corporation Commission vacating prior orders that for many years have had the effect under Oklahoma statutes of maintaining petitioner's oil and gas leases is a valid exercise of police powers, or is an uncompensated taking of petitioner's property contrary to the fifth and fourteenth amendments to the federal constitution.*

2. Whether under the federal constitution's Due Process Clause the Oklahoma Corporation Commission, in the exercise of its delegated police powers, validly may vacate its longstanding orders upon which valuable property rights have been based, thereby terminating or substantially impairing those property rights, in the face of an alternative remedy that will preserve them.

3. Whether in the exercise of its delegated police powers the Oklahoma Corporation Commission validly may vacate its longstanding orders, pursuant to which valuable property rights have developed and have been maintained, without considering the destructive effect of its order on those property rights and without giving a reasoned explanation for its action.

4. Whether under the federal constitution's Contract Clause the Oklahoma Corporation Commission validly may vacate its longstanding orders pursuant to which valuable contractual rights have arisen and have been maintained for many years.

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[1] Petitioner Harper Oil Company expressly adopts and incorporates by reference all questions and arguments presented in the Petition for Writ of Certiorari filed by Union Texas Petroleum, *et al.*, on June 7, 1982. In the present petition, Harper urges on its own behalf arguments in support of Question 1 herein. Questions 2 through 4 presented here essentially restate the questions similarly presented in the Petition of Union Texas Petroleum, *et al.* References will be made herein to the opinions and orders reproduced for the Court's convenience in the Joint Appendix filed in conjunction with this petition and with the petition of Union Texas Petroleum, *et al.*

LIST OF PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF THE STATE OF OKLAHOMA[2]

Amerada Hess Corporation
Atlantic Richfield Company
Champlin Petroleum Company
Corporation Commission of the State of Oklahoma
Dierksen, Harvey W., *et al.*[3]
Eason Oil Company
Gungoll, Carl E.
Harper Oil Company
Henry H. Gungoll Associates
Ladd Petroleum Corporation
Mack Oil Company
Odessa Natural Corporation
Oklahoma Natural Gas Company
Okmar Oil Corporation
Singer-Fleischaker Oil Operating Company, Inc.
Tenneco Oil Company
Union Oil Company of California
Union Texas Petroleum, a Division of Allied Chemical Corporation
Ward, L. O.
Woods Petroleum Corporation

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[2] The following entities are all of the parent companies, non-wholly-owned subsidiaries, and affiliates of petitioner:

MidCon Corp.
Natural Gas Pipeline Company of America
Royalton Coal Corporation
Walking Eagle Corporation

[3] Harvey W. Dierksen, *et al.*, are certain owners of mineral interests in an Oklahoma oil and gas reservoir.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner HARPER OIL COMPANY respectfully files this Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma to review the judgment of that court and its opinions entered on July 21, 1981, and March 8, 1982.

OPINIONS AND ORDERS BELOW[4]

The opinion of the Oklahoma Supreme Court in *Union Texas Petroleum* v. *Corporation Commission of Oklahoma* is not yet published. A copy of the majority opinion is reproduced beginning at page 1a of the Joint Appendix. A copy of the dissenting opinion is reproduced beginning at page 29a of the Joint Appendix. The unpublished decision of the Oklahoma Corporation Commission in Order No. 148243, the affirmance of which is the subject of this petition, is reproduced beginning at page 48a of the Joint Appendix.

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[4] The statements of Opinions and Orders Below and of Jurisdiction are as set forth in the Union Texas Petroleum, *et al.* petition.

JURISDICTION

Order No. 148243 of the Oklahoma Corporation Commission was signed on January 3, 1979. The decision of the Oklahoma Supreme Court affirming the Commission was issued on July 21, 1981. All petitioners timely sought rehearing. The Oklahoma Supreme Court denied the petition for rehearing on March 8, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

STATUTES INVOLVED

Okla. Stat. Ann. tit. 52, § 87.1(d), (e) (West Supp. 1981):

> (d) The Commission shall have jurisdiction upon the filing of a proper application therefor, and upon notice given . . . , to decrease the size of the well spacing units or to permit additional wells to be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of wastes prohibited by statute, or any of said wastes, or will protect or assist in protecting the correlative rights of persons interested in said common source of supply . . . .
>
> (e) The portions of production allocated to the owner of each tract or interest included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon.

STATEMENT OF THE CASE[5]

The Commission's order is the first step and perhaps the only step necessary to the termination of oil and gas leases held by petitioner Harper Oil Company.

Petitioner holds leases covering approximately 3,000 acres of land overlying the Mississippian Formation in Garfield and Major Counties, Oklahoma. These leases contain standard clauses providing that they will remain in effect for a primary term of years and thereafter for so long as oil and gas is produced thereunder. They cover acreage within the 640-acre spacing units established by the Commission in the early 1960s. Under Oklahoma law, the effect of a 640-acre spacing rule is that production from a well situated anywhere within the 640-acre unit is deemed to be production from all leases covering land within that unit. Section 87.1(e) of Title 52 provides in pertinent part:

> The portions of production allocated to the owner of each tract or interest included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled therein.

Okla. Stat. Ann. tit. 52, § 87.1(e) (West Supp. 1981). Thus, the effect of section 87.1(e) and the spacing orders has been to hold and maintain in effect all of petitioner's leases in the 640-acre units.

Over the past two decades, petitioner and other operators have invested millions of dollars in exploring and developing the Mississippian Formation. In 1977 and 1978, various

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[5] To avoid duplication, the Statement of the Case and Reasons for Granting the Writ set forth in the Union Texas Petroleum, *et al.* petition are adopted and incorporated by reference rather than being restated in full here.

individual respondents entered into agreements known as top leases with persons not parties to these proceedings. Top leases are leases taken on lands already subject to a prior oil and gas lease. They are taken in anticipation of the termination or cancellation of the underlying lease and do not become operative until then.

In an effort to terminate petitioner's leases held by production from unit wells and to effectuate the top leases, respondents filed applications with the Commission seeking to change the spacing pattern for the Mississippian Formation from 640 acres per well to 160 acres per well. The legal consequence of such a spacing change is that production from an existing unit well will no longer be deemed to be production from all lands within the 640-acre unit, but will be considered as production only from the 160-acre quarter-section upon which the well is physically located.

Holding with respondents, the Commission abandoned its policy of allowing the drilling of additional wells within existing spacing units when further development was required, and instead "vacated, set aside, and held for naught" spacing orders that had been in effect for more than sixteen years.[6] It concluded that "the most reasonable and equitable basis for the future orderly further development of the Mississippian" is to reduce the size of the spacing units in the entire field. Joint Appendix at 78a.[7]

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[6] Order No. 49133, which originally established 640-acre spacing units for the formation, was issued in 1962. Order No. 50337, as amended, was originally issued in 1963. Both were vacated by Order No. 148243 issued in 1979.

[7] In 1979, when the application that culminated in Order No. 148243 was filed, petitioner Harper Oil Company was actively engaged in an infill drilling program in the Mississippian Formation. It had several applications on file with the Commission seeking authorization to drill additional wells within various spacing units. These applications were not acted upon by the Commission.

This had the effect of destroying the value of petitioner's leases. The Commission based its decision in substantial part on its view of the development history of the formation and on the positions taken by petitioner in the hearing before it. It reasoned that petitioners and respondents had "reasonably comparable knowledge," but that they differed with respect to the most "reasonable and equitable basis for the future orderly further development" of the reservoir. It emphasized that while petitioners had applied for additional drilling authorization in the past, petitioners now were contending that there had been "no change of conditions or knowledge of conditions" with respect to the 640-acre units since their establishment. *Id.*

From this, the Commission concluded that allowing further development through additional wells on existing units (which would have been drilled by petitioners) would be "in derrogation of its . . . duty and responsibility" and would constitute an "indirect delegation" thereof to "any owner whose subjective interests may be in conflict with the ends of waste prevention or correlative rights protection." *Id.* By its order, however, the Commission effectively "delegate[d]" to respondents and their top lessees the "duty and responsibility" to develop the formation.

The Oklahoma Supreme Court affirmed. With respect to the Commission's choice of remedies, it stated:

> Factually, the record contains indicia that for extended periods of time, Commission orders allowing additional wells on the basis of inability to recover known reserves have not been carried out....
>
> ... The Commission's conclusion that past density applications *by owners in the unit have not uniformly developed a common source, and have not been carried out with dispatch,* negates the allegation that both sta-

> tutory remedies [*i.e.*, reducing the size of the unit or allowing additional wells within existing units] are equally suited to the facts, and substantial evidence supports the choice of alternatives made by the Commission.

Id. at 24a-25a.

The only difference between the two remedies is that in reducing the size of the units, the question is raised whether leases that previously have been held by production now have terminated. Insofar as the stated objective of "orderly development" is concerned, there is no difference.

The Oklahoma Supreme Court has never specifically addressed the question whether the discontinuance of attributed production under section 87.1(e) causes leases held by such production to terminate. As the result of the Commission's order, that issue is now or will be before the Oklahoma state courts with respect to every petitioner from the proceeding below. Petitioner Harper cannot say, therefore, that its leases to which production is no longer attributable as a result of the Commission's order have terminated. It is clear, however, that until the Oklahoma courts expressly rule that Order No. 148243 did *not* cause a termination of petitioner's leases or that equity should intervene to prevent termination, such leases have little, if any, value.[8]

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[8] Further, under the cloud cast by that order, petitioner cannot safely commit funds to drill additional wells. This itself gives rise to claims for lease termination. *See* W. Summers, The Law of Oil and Gas § 463 (West 1958 & Supp. 1981).

REASONS FOR GRANTING THE WRIT

Valuable property rights become vested or dependent over the years on the basis of state administrative orders and authorizations. Substantial investments are made in reliance on the continuance of the orders and policies of state agencies. Especially is this true in the area of oil and gas conservation.[9] The extent to which these orders and policies can be changed, vacated, and nullified, and the extent to which property rights dependent upon them can be destroyed or damaged in the exercise of police powers without constituting a taking, is a significant question that this Court should address.

Before the issuance of Order No. 148243, petitioner's production from a well on a 640-acre unit held all leasehold acreage in the entire unit. If this order is valid, the same well will hold acreage only within the newly prescribed 160-acre unit. Unless the state courts hold to the contrary, petitioner's leases covering the remaining 480 acres have lapsed and reverted to respondents and their top lessees, according to the Commission, "to the ends that a greater ultimate recovery of oil, gas, and condensate be had from the Mississippian, waste be prevented and the correlative rights of the owners of oil and gas interests therein be, to a fuller extent, beneficially enjoyed and protected." Joint Appendix at 81a.

This is a manifest taking of petitioner's property purportedly to accelerate drilling. In the context of their dissent, three of the justices so stated:

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[9] *See, e.g., Railroad Comm'n of Texas* v. *Aluminum Co. of Amer.*, 380 S.W.2d 599, 601 (Tex. 1964); *Atlantic Refining Co.* v. *Railroad Comm'n of Texas*, 162 Tex. 274, 288, 346 S.W.2d 801, 811 (1961).

> In concluding that smaller units are required to protect the correlative rights, the Commission ignored the fact that the establishment of 160-acre units deprived the owners of existing leases, which were held by production of their property, and awarded them to the parties who had taken top leases in expectation that the Commission might be persuaded to enter such an order.

Id. at 40a.

Had the Commission, in a straightforward manner, ordered petitioner's leases terminated because, to use the Oklahoma Supreme Court's words, petitioner had "not uniformly developed the common source" or had not drilled additional wells "with dispatch," the taking aspect of the order would be plainly apparent. Yet the Oklahoma court accepts this result on the ground that it was supported by substantial evidence. Substantial evidence does not, however, justify a taking without compensation. If the state's interests are such that the property rights of certain parties must be eliminated in order to achieve some desired objective, compensation is owed. *See San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 649 (1980) (Brennan, J., dissenting from dismissal of appeal for lack of final judgment).

It is not necessary that title be divested for there to be a taking. A taking can occur from a substantial impairment of value. *See San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. at 649; *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). This is clearly the case here.

This Court should grant review in order to provide guidance to administrative agencies with respect to the questions presented by this petition, and to correct the error below.

CONCLUSION

For the reasons stated herein and for those urged by Union Texas Petroleum, *et al.*, petitioner Harper Oil Company respectfully urges this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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